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NO. 83645-1

CLERK SUPREME COURT OF THE STATE OF WASHINGTON

TACOMA NEWS, INC., d/b/a THE
NEWS TRIBUNE,

Petitioner,

v.

THE HONORABLE
JAMES D. CAYCE,

Respondent.

STATE'S MEMORANDUM
RE: MANDAMUS ACTION
AGAINST STATE
OFFICER

I. IDENTITY OF PARTY

This memorandum is presented by the State of Washington, which was invited by the Court to respond as a party at interest.

II. STATEMENT OF THE CASE

The State is prosecuting the matter of *State of Washington v. Michael Andrew Hecht*, Pierce County Superior Court Cause No. 09-1-01051-1. Defendant Hecht is a Pierce County Superior Court judge. The Attorney General's Office agreed to prosecute the case due to a conflict of interest recognized by the Pierce County Prosecuting Attorney's Office. Additionally, due to a conflict of interest recognized by the Pierce County bench, a visiting judge from King County, the Honorable James D. Cayce, agreed to preside over the trial proceedings. **Appendix A (Declaration of John Hillman).**

FILED AS
ATTACHMENT TO EMAIL 1

ORIGINAL

Trial is currently scheduled for October 12, 2009. On September 16, 2009, Judge Cayce granted the State's motion to depose a material witness, Joseph Pfeiffer, who was held on bail following his arrest on a material witness warrant. In open court, the trial court ordered the deposition to take place at 9:00 a.m. on September 21, 2009. The court indicated that it would revisit Pfeiffer's detention on bail following the deposition. The State did not request the presence of Judge Cayce at the deposition. Defendant Hecht requested that Judge Cayce be present. Judge Cayce acceded to the defendant's request and agreed to preside over the deposition. **Appendix A.**

The State determined to hold the deposition in an empty courtroom in Pierce County for the convenience of the jail staff charged with transporting and guarding Pfeiffer during the deposition. The State secured an empty courtroom and advised all parties, the court, and counsel for the witness of the date, time, and location of the deposition. The State hired a court reporter and videographer to record the deposition. The State arranged for the jail to transport witness Pfeiffer to the courtroom for the deposition. **Appendix A.**

The parties appeared for the deposition at 9:00 a.m. on September 21, 2009. Defendant Hecht notified the court prior to the start of the deposition that he wished to close the deposition to the public. The

State notified the court that the State needed to make a record of a grant of immunity that was necessary prior to the deposition. Judge Cayce stated that those two issues would be addressed on the record and the courtroom open to the public when they were argued. **Appendix A.**

Defendant Hecht moved to close the deposition to the public. Judge Cayce agreed that the pretrial deposition was not a court hearing. Judge Cayce ruled that depositions are not open to the public and holding a deposition in a courtroom did not transform it into a public hearing. Judge Cayce then addressed the immunity issue. Following that, the videographer announced the start of the deposition. **Appendix A; Appendix B (Verbatim Report of Proceedings).**

The deposition was held from 9:30-12:00 p.m. The courtroom was open, but nobody from the public entered. Judge Cayce was present at the deposition and ruled on objections. At 12:00 p.m., the deposition was interrupted for a lunch break. **Appendix A.**

The deposition resumed at approximately 1:15 p.m. The courtroom remained open and again nobody from the public entered. **Appendix A.**

At 1:30 p.m., a news reporter and a lawyer for the Tacoma News Tribune entered just as the deposition was concluding. Defendant Hecht immediately moved the court to exclude the reporter from the deposition.

Counsel for the News Tribune addressed the court. The court ruled that the deposition was not open to the public. The news reporter and lawyer left the courtroom. Judge Cayce caused "courtroom closed" signs to be posted on the courtroom doors for the remainder of the deposition, which continued for only a few minutes. As soon as the deposition was concluded, the "closed" signs were removed. **Appendix A; Appendix B.**

Judge Cayce then convened the parties for court and held a bail hearing for the witness who was being detained. The bail hearing was open to the public. **Appendix A.**

The transcript and video of the deposition are not part of the court record in *State v. Hecht*. The State has not yet been provided with the original transcript and video of the deposition that it paid for. The State is in possession of a copy of the transcript. Once the original transcript and video are provided, the State, not the court, will be in possession of both. **Appendix A.**

The video and transcript of the deposition are potential trial exhibits the State caused to be created. These exhibits may or may not be offered at trial. **Appendix A.**

Judge Cayce has ordered two more videotaped depositions at the State's request. The two deponents are not in-custody and the State has

scheduled the two depositions at a conference room in Seattle that is not open to the public. **Appendix A.**

III. LAW AND ARGUMENT

The Supreme Court of Washington has original jurisdiction for mandamus actions against state officers. RCW 2.04.010; RAP 16.2(a). The court may grant a writ of mandamus to “compel the performance of an act which the law especially enjoins as a duty resulting from an office....” RCW 7.16.160. A writ is appropriately issued in cases where there is not a “plain, speedy and adequate remedy in the ordinary course of law,” upon affidavit of a beneficially interested party. RCW 7.16.170.

In the present case, the petitioner’s claim for relief fails on several fronts. First, the petitioner fails to establish Judge Cayce has a duty to compel the State to release its potential trial exhibits to the media. Petitioner cites no authority for the proposition that the judge presiding over a criminal case is required to compel a party to release pretrial discovery to the public (unless such discovery must be released pursuant to public disclosure laws, etc.).

Second, Petitioner fails to establish that there is no “plain, speedy, and adequate remedy in the ordinary course of the law.” To the contrary, the petitioner may attend the criminal trial, which will commence in less than two weeks, and observe Joseph Pfeiffer testify in person or watch a

video of his deposition if it is admitted and published. Thereafter the petitioner can report on the testimony it observes in open court. Additionally, the petitioner can seek to compel the custodian of the item at issue, which is the State, not the trial court, to produce the document by way of a public disclosure request.

Third, Petitioner seeks to compel Judge Cayce to release something that Judge Cayce does not possess or control—the video and transcript of the deposition. These items are not part of the court record or in the court's possession. Nor will they be unless offered by one of the parties. These items are potential trial exhibits created by and in the custody of the State.

Finally, depositions of potential witnesses are not “criminal hearings” open to the public. Judge Cayce made the right ruling.

A. A Writ Of Mandamus Does Not Lie Because Petitioner Fails To Satisfy The Statutory Requirements Of RCW 7.16.170.

The Court should not issue a writ of mandamus unless the petitioner party has established (1) a state officer has failed to perform an act which the law compels him to perform as a duty of his office, and (2) there is no plain, speedy, and adequate remedy in the ordinary course of the law. RCW 7.16.170. The petition herein fails on both accounts.

1. The record presented does not establish that Judge Cayce failed to perform an act which his office required him to perform.

The News Tribune's petition fails to establish or articulate how or why Judge Cayce is compelled by his office to order the State to produce one of its potential trial exhibits for inspection by the News Tribune. Indeed, the News Tribune never asked Judge Cayce to produce the transcript and video of the deposition—the News Tribune only asked Cayce that they be allowed to observe the pretrial deposition of a witness.

Now, without ever having made a request below or obtaining a ruling to review, the News Tribune asks this Court to compel Judge Cayce to release a potential trial exhibit in the custody of the State. The State has never heard of such an occurrence happening in a criminal case except in the context of a public disclosure request (which has not occurred in this case and is not an issue before the Court). Petitioner offers no facts, authority, or argument demonstrating how Judge Cayce failed to perform a duty required of him. This is especially so where Judge Cayce was not asked to grant the relief Petitioner now requests in this mandamus action; or where Judge Cayce's duties as a superior court judge in a criminal case do not require him to order the parties to disseminate pretrial discovery to the media.

2. The News Tribune's petition fails because there is a plain, adequate, and speedy remedy available in the ordinary course of the law

In the ordinary course of the law, the media takes advantage of the right to public trial in criminal cases by reviewing court documents and attending trial proceedings. Thereafter the press is free to report on the matters reviewed. The press does not have the right to be present at police interviews of witnesses, witness interviews conducted by the parties, or pretrial depositions of witnesses. Holding an interview or a deposition in the courthouse or in an empty courtroom does not transform a discovery process into a "criminal hearing."

Petitioner's demand that the court order the parties to produce pretrial discovery for media review is not something that occurs in the ordinary course of the law. Petitioner offers no facts, authority, or argument to the contrary.

Petitioner has several plain, adequate, and speedy remedies available. First, the petitioner may attend the public trial that is going to commence in less than two weeks, observe Joseph Pfeiffer's testimony (which might include publication or reference to the deposition), and report on it. That is what would ordinarily occur and this case should be no different.

Second, the News Tribune may file a public disclosure request to the State. The State, not the Court, possesses the items that the News Tribune seeks. Washington's Public Records Act contains provisions that allow an entity such as the News Tribune to request production of records in the State's custody. Chapter 42.56 RCW. There are provisions providing exemptions to disclosure which may apply in this case. *E.g.*, RCW 42.56.210. Nevertheless, The News Tribune has not exercised this potential remedy, which is the plain, ordinary, and speedy remedy in the ordinary course of the law. A writ of mandamus to Judge Cayce does not lie in this case.

B. The Petition For Writ Of Mandamus Must Be Dismissed Because The News Tribune Seeks To Compel Judge Cayce To Produce Something That Judge Cayce Does Not Possess Or Control.

The pretrial deposition at issue is not part of the court record. The deposition has not been filed in the trial court. The deposition will not be filed with the court unless one of the parties offers the deposition as a trial exhibit or chooses to offer it as part of some other court hearing in *State v. Hecht*.

The deposition was not taken as part of a court hearing—the witness' testimony was taken as a pretrial deposition when court was not in session, as allowed by the Criminal Court Rules and Civil Court Rules.

CrR 4.6; CR 28-30. The News Tribune asks the Court to issue a writ of mandamus directing Judge Cayce to produce something that Judge Cayce does not possess or control. The petition should be dismissed.

C. The Petition Should Be Dismissed Because Pretrial Depositions In Criminal Cases Are Not Open To The Public And The Press Has No Constitutional Right To Access To Pretrial Discovery.

Petitioner's entire argument hinges on whether a deposition is a "criminal hearing" subject to *Seattle Times v. Ishikawa*. See *Ishikawa*, 97 Wn.2d 30, 37 (1982) ("Each time restrictions on access to *criminal hearings* or the records from hearings are sought, courts must follow these steps . . .") (emphasis added). *Ishikawa* held that the trial court must engage in a five-part analysis prior to closing a criminal court hearing to the public.

In *Ishikawa*, there was no dispute that the closure of a "criminal hearing" was at issue. Such is not the case here. As set forth below, depositions are not court proceedings subject to *Ishikawa*. Nor are depositions open to the public if the parties do not wish them to be.

Pretrial depositions of witnesses may be taken in a criminal case if ordered by the trial court. CrR 4.6(a). The court may order a deposition in a criminal case only if the witness (1) refuses to be interviewed or there is a showing that the witness "may be unable to attend or prevented from

attending a trial,” (2) the testimony of the witness is material, and (3) a deposition is necessary in order to prevent a failure of justice. CrR 4.6(a).

If the court in a criminal case determines that a deposition is appropriate, the deposition is then taken in accordance with the Civil Rules. CrR 4.6(c). Thereafter, the deposition is admissible only as allowed by the Evidence Rules. CrR 4.6(d).

The Civil Rules allow that depositions may be taken before various officers, to include court commissioners, judges, notaries public, or any person stipulated to by the parties. CR 28, 29. There is no requirement in the Civil Rules that require that depositions be taken in public courtrooms. There is no requirement that a judge of the superior court be present. Nothing in the Civil Rules prohibits the taking of a deposition in a private place not open to the public; in fact, that is the norm.

This Court has recognized that depositions are not generally open to the public. *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 244, 654 P.2d 673 (1982). In *Rhinehart* the plaintiff sued the Seattle Times for defamation. Pretrial discovery ensued, to include depositions. The plaintiff sought a protective order to preclude the Times from publishing the depositions as part of the Times’ news reports. Plaintiffs obtained a protective order precluding the Times from disseminating the depositions. The Times asked this court to review the protective orders, arguing that

the protective orders infringed on its First Amendment rights. This Court noted that the purpose of provisions of the Civil Rules allowing for protective orders of discovery was to preserve the confidentiality of materials which are revealed in discovery but not made public by trial:

Nowhere in the history of the rules or in the commentaries which we have read upon them can we find any indication that the purposes included that of disseminating to the general public the information derived from discovery, or any suggestion that such dissemination would serve the ends sought to be achieved by the rule.

Rhinehart at 235. When asked to compare Florida law to Washington law as part of the analysis, this Court concluded, “under Florida law depositions are generally open to the public. That is not the case in this state.” *Id.* at 244 (emphasis added).

Under the Criminal Rules, the parties do not need a protective order to preclude the dissemination of discovery. There are numerous statutes that preclude the prosecution from disseminating criminal discovery to the public. *E.g.*, Chapter 10.97 RCW (“Washington State Criminal Records Privacy Act”). Additionally, the prosecutor has certain ethical duties not to make statements to the public, or disseminate information to the public, which could heighten public condemnation of the accused. RPC 3.8(f). Similarly, defense counsel in a criminal case is required to maintain exclusive custody of discovery provided to the

defense by the prosecutor. CrR 4.7(h)(3).¹ In short, absent a party choosing to present discovery as part of the presentation of its case, or absent a public disclosure request or other order of the court compelling a party to release information to the public, Washington's matrix of privacy statutes and criminal court rules do not permit the parties to release pretrial discovery to the media unless it is a necessary part of a court hearing or pleading.²

Washington case law appears silent on the issue of whether a deposition is transformed into a "criminal hearing" if the deposition is held in a courtroom and a judge presides. But other jurisdictions have rejected the arguments presented by the News Tribune in this case.

In *Palm Beach News v. Burk*, 504 So.2d 378 (1987), the State of Florida prosecuted a defendant for attempted murder. The parties noted pretrial depositions of witnesses as allowed by Florida law. *Id.* at 379. The press, The Palm Beach News, sought to be present at the depositions and also sought to obtain copies of depositions even if they had not been transcribed or filed with the court. *Id.* The trial court ruled that pretrial

¹ "Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case. ..."

² For example, the State may summarize the contents of the discovery in a declaration for determination of probable cause necessary to be filed with the court at arraignment; or a party may offer excerpts of discovery or summarize the contents of discovery in exhibits or declarations offered in support of motions, etc.. In these instances, the party chooses to make parts of the discovery part of the public record.

depositions were not judicial proceedings open to the public or the press.

Id. The ruling was appealed to the Florida Supreme Court. *Id.*

The Florida Supreme Court surveyed a large body of case law, including many United States Supreme Court decisions and *Rhinehart v. Seattle Times*, *supra*. *Id.* at 379-383. Citing with approval this court's opinion in *Rhinehart v. Seattle Times*, the court concluded that the press does not have a First Amendment right to be present at depositions or to obtain copies of depositions that have not been filed with the court. *Palm Beach News*, 504 So.2d 378, 383 (1987). The court recognized that "[a] deposition is nothing more than a statement of a witness taken under oath in accordance with the rules" until it is offered at trial. *Id.* At 383. The court further recognized that "[d]eposition proceedings are not public components of a trial unless made so by the parties." *Id.* at 382. The court cautioned that:

Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.

Id. at 384. The Florida Supreme Court held unanimously that pretrial depositions in a criminal case are not open to the public.

Id.

This court should follow the sound reasoning of *Palm Beach News*. Allowing the press to be present for pretrial discovery interviews and depositions would unfairly fetter the ability of the parties in a criminal case to prepare a case for trial. The media's unrestricted access to pretrial discovery would also impair the defendant's ability to obtain a fair trial before impartial jurors. As the court in *Palm Beach News* recognized, the media's rights must always yield to the accused's right to a fair trial. *Palm Beach News* at 380. "The right to speak and publish does not carry with it the unrestrained right to gather information." *Palm Beach News* at 383 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17, 895 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965)). The press does not have a constitutional right of access to pretrial discovery in a criminal case.

In the present case, the court ordered a pretrial deposition of witness Pfeiffer. Pfeiffer was incarcerated and therefore the State determined to hold its deposition in a courtroom for the convenience of the jail staff. The deposition that was taken was not a criminal hearing—it was a deposition, a part of the discovery process in *State v. Hecht*.

The deposition video and transcript are potential trial exhibits that the State caused to be created. The deposition has not been filed with the court or offered as an exhibit. The deposition is not currently part of the court record. If the deposition is used at all in a criminal proceeding in *State v. Hecht*, it will be used in open court before any members of the public who choose to be present to hear or view it.

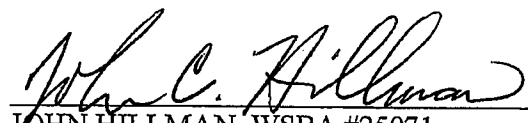
IV. CONCLUSION

The petition for writ of mandamus must be dismissed. Petitioner has other plain, speedy, and adequate remedies to pursue in the ordinary course of the law. Petitioner fails to make even a prima facie showing that Judge Cayce failed to perform an act required of his office. Finally, depositions are not open to the public.

RESPECTFULLY SUBMITTED this 28th day of September, 2009.

ROBERT M. MCKENNA
Attorney General

By:


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Seattle, WA 98104
206-389-2026

Appendix A

SUPREME COURT OF THE STATE OF WASHINGTON

TACOMA NEWS, INC., a Washington
Corporation, d/b/a THE NEWS
TRIBUNE,

Petitioner,

v.

THE HONORABLE
JAMES D. CAYCE,

Respondent.

DECLARATION OF
JOHN HILLMAN

John C. Hillman declares under penalty of perjury:

1. I am an assistant attorney general and represent the State of Washington in the criminal case of *State v. Michael Andrew Hecht*, Pierce County Cause #09-1-01051-1.

2. Defendant Hecht is a Pierce County Superior Court judge. On January 7, 2009, the Pierce County Prosecuting Attorney recognized a conflict of interest and requested that the Attorney General assume criminal jurisdiction over the investigation and any prosecution as allowed by RCW 43.10.230 and .232.

3. The State filed an information in Pierce County Superior Court on February 27, 2009. The information charged defendant Hecht

with one count of harassment and one count of patronizing a prostitute.

The information is appended to the petition for writ of mandamus.

4. The Pierce County Superior Court bench recognized a conflict of interest. The Honorable James Cayce, King County Superior Court, agreed to preside over the case as a visiting judge for Pierce County.

5. Defendant was arraigned on March 13, 2009. Trial was originally scheduled for June 8, 2009. The trial was later continued to September 8, 2009.

6. One of the State's primary witnesses is Joseph Pfeiffer. Defendant Hecht is accused in Count II of paying Pfeiffer for sex in 2008. Joseph Pfeiffer is a material witness. Joseph Pfeiffer is also transient.

7. On August 25, 2008, after many efforts to try to locate Pfeiffer and serve him with a subpoena, the State moved for and was granted a material witness warrant for Pfeiffer. The State was unable to serve Pfeiffer with either a subpoena or the arrest warrant prior to the September 8th trial date.

8. On September 8, 2009, the State moved to continue the trial due to the absence and unavailability of material witness Joseph Pfeiffer. The State's motion was granted and the trial was continued to October 12, 2009, which is the current trial date.

9. On September 15, 2009, witness Pfeiffer was arrested in West Olympia on the material witness warrant. Pfeiffer was transported to the Pierce County Jail. Attorney Robert Quillian of Olympia was appointed to represent Pfeiffer.

10. A bail hearing was held before Judge Cayce in open court on September 16, 2009. The trial court ordered that Pfeiffer be held on \$75,000 bail pending trial. The trial court granted the State's motion to preserve Pfeiffer's testimony by deposition as allowed by CrR 4.6. The court ordered that the deposition would take place at 9:00 a.m. on September 21, 2009. The court indicated that it would reconsider Pfeiffer's bail after the video deposition. Tacoma News Tribune reporter Adam Lynn was present in the gallery for this hearing.

I do not have a copy of the signed motion and order that was filed with the court as it has not yet been scanned online by the court clerk and I have not had the opportunity to secure a certified copy prior to the filing of this declaration. However, Attachment 1 to this declaration is a copy of the motion and the order that Judge Cayce signed and entered on September 16, 2009.

11. Due to Pfeiffer's in-custody status, I contacted Pierce County Superior Court administration and asked if there was an empty courtroom I could use for the deposition. I determined to hold my

deposition in a courtroom-only because witness Pfeiffer was in jail and it was most convenient for the jail staff to transport Pfeiffer to a courtroom and maintain custody of him there. I know from past experience that the Pierce County Jail is connected to most of the courtrooms in the courthouse by secure tunnels, hallways, and doors.

12. I did not request that Judge Cayce be present for the deposition of Joseph Pfeiffer; nor did I think it necessary. Because Pfeiffer was in-custody, had been appointed counsel, and was potentially a difficult witness (it was unknown at that time whether he would be cooperative), counsel for defendant Hecht requested that the judge preside over the deposition as allowed by CrR 4.6(c), CR 28, and RCW 2.28.080(3). The judge noted that he would have to travel to Pierce County for a bail hearing after the deposition regardless, so he consented to travel to Pierce County to preside over the deposition.

13. Once I secured an empty courtroom, my office hired Byers & Anderson, Court Reporters, to record the deposition both by video and stenography. Pierce County Superior Court Administration, the Pierce County Jail, Judge Cayce, Mr. Quillian, and Mr. Fricke were all notified of the date, time, and location of the video deposition.

14. *State v. Hecht* is a Pierce County case and Pierce County Superior Court provides a court reporter for all court hearings. Pierce

County Superior Court contacted me prior to the deposition and expressed concern that a bail hearing would be held following the deposition and they might not have a court reporter available to record the bail hearing due to staffing issues. Pierce County Superior Court asked if I would be willing to have my hired court reporter record the bail hearing in the event Pierce County did not have a court reporter available at the time that the bail hearing was ready to proceed. I agreed to have my hired court reporter perform that service if necessary in order to avoid any delay following the video deposition.

15. The parties appeared in Courtroom 2-A of the Pierce County Courthouse at 9:00 a.m. on September 21, 2009, as did Pfeiffer's counsel Mr. Quillian. The jail transported witness Pfeiffer from the Jail to Courtroom 2-A, but they arrived approximately 20 minutes late. Myself, Mr. Hecht's counsel Wayne Fricke, and the judge met in chambers briefly while waiting for the witness and jail staff to arrive. Somebody, either the judge or Mr. Fricke, I don't recall who, raised the subject of whether the deposition would be open to the public. Mr. Fricke requested that the deposition be closed. The judge determined to have Mr. Fricke make that motion on the record and the judge would rule. It was also decided that a record would be made concerning transactional immunity for witness Pfeiffer as Pfeiffer was going to be asked questions that would require

Pfeiffer to admit to acts of prostitution. The judge indicated that the motion to close the courtroom and the motion to grant immunity would be open to the public.

16. Judge Cayce asked if my hired court reporter could record the hearings we were going to have prior to the deposition given that no superior court staff reporter was present. I was aware of Pierce County's shortage of court reporters and did not want the deposition to be delayed while they tried to find someone. I agreed to have my court reporter record the hearings.

17. After witness Pfeiffer arrived, we began a court hearing to address whether the deposition was public and whether witness Pfeiffer would have immunity for prostitution. The doors to the courtroom were open. There were no members of the public present in the courtroom. Mr. Fricke moved the court to close the deposition to the public. Judge Cayce agreed with Mr. Fricke that a deposition was not a court hearing. I recall Judge Cayce noting that the deposition could in fact be held in a private conference room without the court's presence, but because of Pfeiffer's custody status this deposition was being held in a courtroom. Judge Cayce did not believe that holding the deposition in a courtroom with a judge present transformed a pretrial deposition into a court hearing.

18. I told the judge that I understood the analysis and essentially agreed with it, but as the prosecutor had some concerns about the constitutional right to public trial. I have past experience with the issue, having represented the State on appeal in the public trial case of *State v. Brightman*, 155 Wash.2d 506, 122 P.3d 150 (2005), as well as representing the State at trial in *State v. David Erickson*, which is currently before this court (#82050-3) on a public trial issue and stayed pending this court's decision in *State v. Momah* (#81096-6).

19. I did not believe that a deposition was a "court hearing" or open to the public. Nor did I or do I believe that holding the deposition in a courtroom for the Jail's convenience transformed the deposition into a court hearing. I did not object to the court's ruling. But I still had concerns given the uncertain state of the case law in the "public trial" area. I suggested that since there were no members of the public present in the courtroom, we should just leave the courtroom doors open and it would be a non-issue assuming nobody came in. The judge stood by his ruling but agreed to leave the courtroom doors open during the deposition until somebody came in, at which time he would reconsider his ruling.

20. The parties addressed the immunity issue on the record. The courtroom was open to the public at all times up to this point.

21. After the immunity issue was addressed and finished, the videographer announced that the deposition was starting. I had previously instructed the court reporter I hired to make two separate recordings—one for the court hearing we had before the deposition, and a separate transcript for the deposition. She agreed to do this.

22. The parties proceeded to take Joseph Pfeiffer's deposition. Objections were lodged during the deposition and the court made rulings. Defendant Hecht was present throughout and he and his counsel had the opportunity to confront and cross-examine Pfeiffer. The deposition proceeded from 9:30-12:00 p.m. The courtroom was open at all times, but no members of the public entered.

23. The deposition resumed at approximately 1:15 p.m. and went to 1:30 p.m. The courtroom remained open. Direct, cross, redirect, and re-cross had taken place. I had two questions scribbled on my pad of paper to ask Pfeiffer on re-redirect. At approximately 1:30 p.m., Adam Lynn and James Beck walked in.

24. Mr. Fricke, counsel for defendant Hecht, immediately moved the court to exclude Beck and Lynn from the courtroom. Judge Cayce gave Mr. Beck an opportunity to argue against it. Mr. Beck cited *Seattle Times v. Ishikawa*. The judge explained to Mr. Beck that a deposition was taking place, not a court hearing, and we could just as

easily be in chambers. The judge asked Mr. Beck if the News Tribune would be allowed to enter chambers, or a law office, if the deposition were held there. Mr. Beck did not have an answer, and at that point the judge ruled that the deposition was not open to the public and ordered Beck and Lynn to leave.

25. Preprinted signs saying "CLOSED HEARING" (or something to that effect, I don't recall the exact wording) were posted on the courtroom doors. The deposition resumed and was completed by approximately 1:40 p.m., probably within minutes of the departure of Beck and Lynn. As soon as the deposition was concluded, I personally removed the "Closed Hearing" signs from the doors. I went into the hallway outside the courtroom to look for Beck and Lynn in order to tell them that they could enter if they wished to observe the bail hearing that would follow. I did not find them.

26. Judge Cayce determined to give the press the opportunity to return to the courtroom to observe the bail hearing if they so desired. Judge Cayce announced that he would take the bench at 2:00 p.m. in order to allow the News Tribune time to return to the courtroom if they so decided. A Pierce County Superior judicial assistant, Val Meade, telephoned the News Tribune and advised that the courtroom was open. Beck and Lynn did not return.

27. At 2:00 p.m., the courtroom was open to the public and the parties proceeded to a bail hearing regarding Mr. Pfeiffer. The court ordered that Pfeiffer be released on personal recognizance under certain conditions of release. I believe this hearing concluded shortly after 2:00 p.m.

28. The State paid for and ordered the transcript and the video of the deposition. To date I have received a copy of the transcript of the deposition, but the original transcript and video have not yet been provided to me. My expectation is that Byers & Anderson will send me the sealed original transcript and video of the deposition soon. Neither a transcript nor the video are currently part of the court record in *State v. Hecht*, nor will they be unless a party offers them at a pretrial hearing or at trial.

29. The video and transcript of the deposition are potential trial exhibits that the State caused to be created. The transcript and/or video may or may not be offered at trial.

30. The video deposition will not be used as substantive evidence at trial unless Joseph Pfeiffer fails to appear at trial and the State is able to establish his unavailability as required by ER 804(b)(1). If Pfeiffer is unavailable at trial and the video ruled admissible, the video deposition would be played as an exhibit in open court before any


members of the public who choose to attend the court proceedings. If Pfeiffer appears at trial, the transcript of the deposition could be used by either party for impeachment, just like any other pretrial statement, and use of the transcript would be before any members of the public who choose to attend the trial proceedings.

31. Pretrial video preservation depositions in a criminal case can be taken several ways. In my past experience I have taken depositions of witnesses with the defendant and defense counsel present but not the court. A video and transcript are made. If the deposition is offered at trial, the court rules on the objections made during the deposition and the deposition is redacted accordingly and presented to the jury in its redacted form. Video preservation depositions may also be taken as they were in this case, with the judge making rulings during the deposition rather than after. Finally, such depositions may be taken without the court physically present, but available by telephone should a ruling be necessary.

32. The trial court in *State v. Hecht* also granted the State's motion for depositions of two other State's witnesses (who, like Pfeiffer, are also homeless). These two witnesses are out-of-custody. Defense counsel and the defendant will be present. The videotaped depositions for each are scheduled to take place in a conference room in the law offices of the Attorney General in Seattle, which is not open to the public. Judge

Cayce will not be present but will be available by telephone if necessary. The deposition of Joseph Pfeiffer would likely have taken place in this same manner were Pfeiffer not in jail at the time of his deposition on September 21, 2009.

DATED this 28th day of September, 2009, at Seattle, Washington.


JOHN HILLMAN, WSBA #25071
Assistant Attorney General

Attachment 1

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6
7 **STATE OF WASHINGTON**
8 **PIERCE COUNTY SUPERIOR COURT**

9 THE STATE OF WASHINGTON,

10 Plaintiff,

11 v.

12 MICHAEL ANDREW HECHT,

13 Defendant.

NO. 09-1-01051-1

MOTION FOR ORDER FOR
DEPOSITION OF WITNESS JOSEPH
ROBERT PFEIFFER

14 **I. MOTION**

15 COMES NOW the State of Washington, by and through its attorney
16 Robert M. McKenna, and his assistant John Hillman, and moves the court for an order granting
17 the preservation of testimony by deposition of witness Joseph Robert Pfeiffer. The motion is
18 based upon the following declaration and CrR 4.6.

19 **II. DECLARATION**

20 JOHN C. HILLMAN declares under penalty of perjury:

21 Defendant is charged with (1) Harassment, and (2) Patronizing a Prostitute. In Count
22 II, the defendant is accused of paying Robert Joseph Pfeiffer for sex on multiple occasions
23 between April 1, 2008, and January 14, 2009. Pfeiffer was an eyewitness to the events that are
24 the basis of Count I. Pfeiffer is a material witness in this case and essential to prosecution of
25 both Counts I and II.

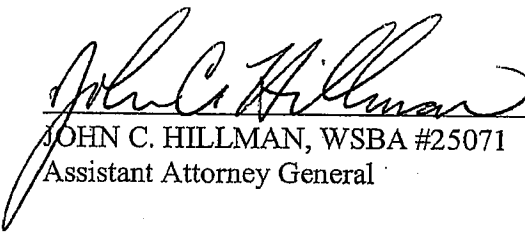
26 Pfeiffer has repeatedly reported that he is indigent and transient. Pfeiffer has reported

1 to both the undersigned and others that he was aware that the State was attempting to serve
2 both a subpoena and a material witness warrant on him during the past several months; and that
3 Pfeiffer was evading service of both. Police arrested Pfeiffer in Tumwater, WA on September
4 15, 2009, and Pfeiffer is currently in custody.

5 Pfeiffer reports living at various residences between Seattle, Tacoma, and Thurston
6 County during the pendency of this case. Pfeiffer sometimes has a working cell phone, but he
7 often changes phones and there are times the phones are inactive. The State's past inability to
8 compel Pfeiffer's attendance at trial caused the court to grant a continuance of the September
9 8th trial date. The State does not want a repeat of that scenario.

10 While in-custody today, Pfeiffer was served with a subpoena to attend the trial
11 currently scheduled for October 12, 2009. Due to Pfeiffer's transient lifestyle and past record
12 of uncooperativeness, the State has concerns that upon release Pfeiffer will not remain in
13 contact with the State or appear at trial as required by the subpoena. The State desires to
14 preserve Pfeiffer's testimony by deposition in the event that he does not appear for trial on
15 October 12 2009.

16 DATED this 15th day of September, 2009 in Seattle, Washington.

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19 JOHN C. HILLMAN, WSBA #25071
20 Assistant Attorney General

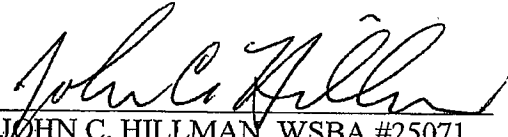
21 **III. LAW AND ARGUMENT**

22 CrR 4.6 authorizes the court to order the deposition of a witness if (1) the witness may
23 be unable to attend or prevented from attending the trial, (2) the witness' testimony is material,
24 and (3) taking the witness' testimony is necessary to avoid a failure of justice. CrR 4.6(a)
25 (emphasis added).
26

1 Here, witness Pfeiffer is indigent and transient. He is extremely difficult to contact.
2 Pfeiffer has admitted purposefully avoiding service of process. Pfeiffer's transiency is such
3 that he may be unable or prevented from appearing at the trial. It cannot be disputed that
4 Pfeiffer's testimony is material to both Counts I and II. Pfeiffer eyewitnessed the events
5 alleged in Count I; and participated in the crime alleged in Count II. A failure of justice would
6 occur if the jury did not hear Pfeiffer's testimony in deciding this case. The Court should order
7 a preservation deposition.

8 DATED this 15th day of September, 2009.

9 ROBERT M. MCKENNA
10 Attorney General

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13 JOHN C. HILLMAN, WSBA #25071
14 Assistant Attorney General
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2 IV. ORDER

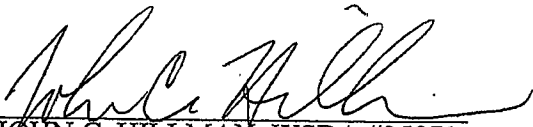
3 The court having considered the declaration above, the representations of counsel in
4 court, CrR 4.6, and the files herein,

5 IT IS HEREBY ORDERD, ADJUDGED AND DECREED that the parties, including
6 the defendant, and counsel for Mr. Pfeiffer, shall appear for preservation depositions of
7 witnesses Joseph Robert Pfeiffer on the ____ day of September, at ____ a.m./p.m. The
8 State shall notify opposing counsel of the location of the deposition.

9 DONE IN OPEN COURT this ____ day of September, 2009.

10
11 _____
12 JUDGE

13 Presented by:

14 
15 JOHN C. HILLMAN, WSBA #25071
16 Assistant Attorney General

17 Copy Received:

18
19 _____
20 WAYNE C. FRICKE, WSBA #16550
21 Attorney for Defendant

22 Copy Received:

23 _____
24 ROBERT QUILLIAN, WSBA #
25 Attorney for Witness Robert Pfeiffer
26

Appendix B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
)	
Plaintiff,)	
)	
vs.)	No. 09-1-01051-1
)	
MICHAEL ANDREW HECHT,)	
)	
Defendant.)	
)	
)	

VERBATIM RECORD OF PROCEEDINGS

(Requested excerpts)

September 21, 2009

Tacoma, Washington

Byers & Anderson, Inc.

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600 University St.	Tacoma, WA 98403
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1 APPEARANCES

2 For the Plaintiff:

3 John C. Hillman
4 Assistant Attorney General
5 800 Fifth Avenue
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7 Seattle, WA 98104-3188
8 206.389.2026
9 206.587.5088 Fax
10 johnh5@atg.wa.gov

11 For the Defendant:

12 Wayne C. Fricke
13 Law Offices of Monte E. Hester
14 1008 South Yakima Avenue
15 Suite 302
16 Tacoma, WA 98405
17 253.272.2157
18 253.572.1441 Fax
19 wayne@montehester.com

20 For the Witness:

21 Robert M. Quillian
22 Attorney at Law
23 2633-A Parkmont Lane SW
24 Olympia, WA 98502
25 360.352.0166
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qlaw@turbotek.net

For Tacoma News Tribune (for a portion of the
afternoon session:

James W. Beck
Gordon Thomas Honeywell Malanca
Peterson & Daheim
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253.620.6402
253.620.6565 Fax
jbeck@gth-law.com

1 APPEARANCES (continuing)

2
3 Also present:

4 Judge James D. Cayce

Valerie Meade, JA

5 Cody Malone, Videographer,

Byers & Anderson, Inc.

6 Court Reporters & Video
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1 BE IT REMEMBERED that on Monday,
2 September 21, 2009, at 930 Tacoma Avenue South, Courtroom
3 2-A, Tacoma, Washington, at 9:27 a.m., before the
4 Honorable James D. Cayce, the following proceedings were
5 had, to wit:

6
7 <<<<<< >>>>>>

8
9 (First requested excerpt of
10 verbatim record of proceedings.)
11

12 THE COURT: Good morning.

13 MR. HILLMAN: Good morning, Your
14 Honor. This is State of Washington versus Michael Andrew
15 Hecht, Cause 09-1-01051-1. John Hillman for the State.
16 The defendant is present with his counsel, Mr. Fricke.

17 We also have a witness who is present for a
18 deposition, Joseph Pfeiffer. His attorney, Mr. Quillian
19 is also present. But before we get in to the deposition,
20 there were a couple of matters that I think needed to be
21 addressed.

22 And the first is that the State's going to be asking
23 questions of Mr. Pfeiffer about prior acts of
24 prostitution that could potentially be charged, and he
25 would be asking to give answers that might incriminate

1 himself. In speaking with his counsel, Mr. Quillian,
2 obviously he would advise his client not to answer those
3 questions.

4 And so pursuant to Rule 6.14, the State's asking the
5 Court to allow a grant of transactional immunity to
6 Mr. Pfeiffer for testimony about any acts of prostitution
7 that may have occurred in Pierce County between September
8 21st, 2008 and January 14th, 2009. And I selected those
9 dates because the statute of limitations for prostitution
10 is one year.

11 So by law, Mr. Pfeiffer could not be charged with
12 any acts of prostitution that occurred prior to September
13 21st, 2008. And I don't believe anybody's going to
14 inquire of him of any prostitution acts subsequent to our
15 charging period.

16 I did prepare a motion and order that Mr. Quillian
17 has gone over with his client and both his client and
18 Mr. Quillian have signed. I've provided a copy of that
19 to Mr. Fricke and ask the Court to enter that order.

20 THE COURT: Thank you. Mr. Fricke, do
21 you have a position on this?

22 MR. FRICKE: I'll just object. I'm
23 not sure if I can take much of a position on it, but I'll
24 register an objection.

25 THE COURT: Mr. Quillian, did you want

1 to add anything?

2 MR. QUILLIAN: No, Your Honor, that's
3 fine. We reviewed it.

4 THE COURT: I'll grant the motion.
5 I've signed the order.

6 MR. HILLMAN: There's an additional
7 issue that Mr. Quillian alerted me to. And as the Court
8 may know from hearing past arguments about the facts of
9 this case, on March 16th of this year, Mr. Pfeiffer went
10 to Mr. Fricke's office and signed an affidavit covering
11 that he had sex with the defendant in the past, he then
12 was provided money by the defendant in the past but they
13 were not in exchange for each other.

14 Mr. Fricke and I both have had the opportunity to
15 interview Mr. Pfeiffer over the weekend. The police
16 interviewed him when he was arrested on the material
17 witness warrant, and I expect him to testify that that
18 part of the affidavit was not true. And so that could
19 potentially subject him to criminal liability, and that's
20 a concern that Mr. Quillian has.

21 And the State would move orally again to grant him
22 transactional immunity just for the March 16th, 2009
23 affidavit so that Mr. Pfeiffer cannot exercise his right
24 to remain silent on that issue and would be compelled to
25 testify about. And if necessary, I can -- if the Court

1 grants the motion, I can memorialize that in another
2 written order.

3 MR. FRICKE: And I register another
4 objection, Your Honor.

5 THE COURT: And I will grant that
6 motion as well and sign an order when it's presented.

7 MR. HILLMAN: Second thing, Your
8 Honor, is prior to court Mr. Fricke and I discussed, and
9 we also discussed with Your Honor in chambers, whether
10 the deposition itself should be open to the public.

11 I would make a record that the deposition was
12 scheduled at 9. It's 9:31. The doors are open and
13 there's nobody in here except for Mr. Quillian. But I
14 believe that the defense had a motion to close the
15 deposition.

16 MR. FRICKE: Yes, Your Honor. I just
17 don't think it's appropriate to have this done in any way
18 other than a closed hearing because of the nature of the
19 process and where we are at in the proceedings. And no
20 one has a right, as far as the public goes or press goes,
21 to be there when you're doing witness interviews during
22 the course of an investigation.

23 And while this is called a preservation deposition,
24 it's still an interview process, and I don't think it
25 would be appropriate for anyone to be allowed to be here

1 other than those necessary to be here. In particular, I
2 think we would have the potential if a reporter showed up
3 and then put in the newspaper potential actual testimony
4 in the record or publicized it in the newspapers or on
5 radio or on TV prior to trial, and I think for those
6 reasons I think this should be a closed hearing.

7 And I believe Ms. Meade, the judicial assistant, has
8 closed hearing signs that she can put on the door and/or
9 lock the door.

10 MR. HILLMAN: Your Honor, I think this
11 is more than an interview. There's discovery depositions
12 and then there's what we're doing here today which is
13 basically the taking of testimony. It's a preservation
14 deposition. There is a distinction.

15 However, I would acknowledge that we don't have to
16 do this in a courtroom. We could do this at my office;
17 we could do it in chambers. Your Honor's not required to
18 be here. And obviously, if we did it those ways, it
19 wouldn't be open to the public. We just happen to be
20 doing this in a courtroom today so I understand what
21 Mr. Fricke's saying there, and I understand the concern
22 about the press potentially coming in and reporting
23 things that may not even be admitted at trial.

24 The State is concerned, you know, the defendant and
25 the public, you know, have a constitutional right to a

1 public trial. As I said before, the case law on that is
2 just very, very strict. It says if the right to a public
3 trial is denied, then it's automatic, you know,
4 reversible error; there's no harmless error analysis, and
5 that's concerning to the State.

6 And the suggestion I was going to make, given that
7 nobody is here, nobody's come in, is just to leave the
8 doors open and unlocked, and if somebody comes in or
9 tries to come in, we could address it at that time.

10 THE COURT: All right. I think that
11 is the best approach. But we're certainly not in trial.
12 This may or may not be admissible at trial. And I think
13 I can close the courtroom and would probably intend to,
14 although, if the press showed up, I'd give them an
15 opportunity, or if the public showed up and wanted to
16 weigh in on this, I would give them an opportunity to try
17 to convince me otherwise. But at this point the doors
18 are open, there's no sign, and it's a moot issue unless
19 someone does come. And certainly Mr. Quillian has a
20 right to be here.

21 MR. HILLMAN: The State didn't have
22 any other issues to address prior to the testimony.

23 MR. FRICKE: I'm ready to go, Your
24 Honor.

25 THE COURT: Okay.

(Conclusion of first requested
excerpt of verbatim record of
proceedings at 9:34 a.m.)

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1 BE IT REMEMBERED that on Monday,
2 September 21, 2009, at 930 Tacoma Avenue South, Courtroom
3 2-A, Tacoma, Washington, at 1:30 p.m. before KATIE A.
4 ESKEW, CCR, RPR, Notary Public in and for the State of
5 Washington, the following proceedings were had and
6 videotaped, to wit:

7 (Seconded requested excerpt of
8 verbatim record of proceedings.)
9 (Mr. Beck enters.)

10
11 MR. FRICKE: Okay. That's all I have,
12 Your Honor. Your Honor, I guess now we have the issue.

13 THE COURT: Unless there's no
14 redirect.

15 MR. HILLMAN: I do have some redirect.

16 MR. FRICKE: I think we need to bring
17 this up.

18 THE COURT: Yeah. We now have
19 observers, one individual from the press. And this is a
20 deposition normally conducted in a law office. The
21 defense is moving to exclude all witnesses, and the
22 State -- are you still objecting?

23 MR. HILLMAN: Your Honor, I think it's
24 kind of an unusual issue and I'll defer to your
25 discretion, but I would ask that if the defendant's

1 making that motion that he also waive his right to a
2 public trial, at least for this deposition.

3 MR. FRICKE: This is -- I'm not --
4 obviously this is not the trial, so -- and I'm not going
5 to waive that right.

6 THE COURT: Waive your right to a
7 public deposition, if there is any right to a public
8 deposition?

9 MR. FRICKE: If there is any right.
10 I'm asking that the only people, as I stated earlier,
11 that are in this courtroom are those necessary for
12 purposes of this. Otherwise, I'd ask that we move it to
13 a law office and it won't be an issue.

14 THE COURT: And then since we are in a
15 courtroom, if we were in a law office, I wouldn't ask the
16 individuals that have just come in if they wish to weigh
17 in on this, but do either of you have any position with
18 respect to whether you should be allowed to stay or not?

19 MR. BECK: Yes, Your Honor. This is
20 James Beck on behalf of the News Tribune. This is --
21 Ishikawa v. Seattle Times I think governs this. This is
22 a proceeding in open court. There's five factors the
23 Court must consider.

24 THE COURT: But let's talk about what
25 this is. What -- what is this hearing?

1 MR. BECK: It's -- we're in open
2 court, so it's testimony of a witness.

3 THE COURT: Okay. Let's all just
4 move. It's going to be easier to move to another room.

5 MR. FRICKE: Either that or we put a
6 "closed hearing" on -- sign on. The only reason we
7 didn't put a closed hearing sign on this thing was
8 because it wasn't an issue this morning.

9 THE COURT: Right. But this is just a
10 deposition normally conducted in a law office. And
11 you're a lawyer?

12 MR. BECK: Yes, Your Honor.

13 THE COURT: Are depositions open to
14 the public?

15 MR. BECK: Your Honor, this is not a
16 deposition, as I understand it. It's a court presiding
17 over a witness in open court. If it's -- if the judge is
18 going to be -- Your Honor is going to be presiding over
19 the same witness in another room in this courthouse, I
20 don't see how that changes matters either.

21 THE COURT: Well, for instance, we get
22 calls at the office when the attorneys are in the middle
23 of a deposition. Is that open to the public because the
24 judge is involved?

25 MR. BECK: Your Honor, I think this

1 proceeding here today is a court proceeding subject to
2 Ishikawa.

3 THE COURT: I think you're wrong, but
4 you can certainly appeal.

5 MR. BECK: Thank you.

6 THE COURT: We'll just -- we'll go
7 ahead and put a closed sign on the courtroom.

8 (Mr. Beck exits.)

9 (Conclusion of second requested
10 excerpt of verbatim record of
11 proceedings at 1:30.)
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1 STATE OF WASHINGTON) I, Katie A. Eskew, CCR, RPR,
2) ss CCR # 1953, a duly authorized
3 County of King) Notary Public in and for the State
4 of Washington, residing at
5 Renton, hereby certify:

6 That the foregoing excerpts of the verbatim record
7 of proceedings was taken before me and completed on
8 September 21, 2009, and thereafter was transcribed under my
9 direction; that the transcript is a full, true and complete
transcript of the excerpts of the verbatim record of
proceedings, including all questions, answers, objections,
motions and exceptions;

10 That I am not a relative, employee, attorney or
11 counsel of any party to this action or relative or employee
12 of any such attorney or counsel and that I am not
financially interested in the said action or the outcome
thereof;

13 That I am herewith securely sealing the said
14 excerpts of the verbatim record of proceedings and promptly
delivering the same to Attorney James W. Beck.

15 IN WITNESS WHEREOF, I have hereunto set my hand
16 and affixed my official seal this day of
17 , 2009.
18
19

20

Katie A. Eskew, CCR, RPR
Notary Public in and for the State
of Washington, residing at Renton.
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